89-242

In The

Supreme Court of the United States

October Term, 1989

R. EUGENE PINCHAM,

Petitioner,

v.

ILLINOIS JUDICIAL INQUIRY BOARD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ILLINOIS COURTS COMMISSION AND ITS MEMBERS

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the U. S. District Court and Seventh Circuit Court of Appeals properly abstained from interfering with a pending judicial disciplinary proceeding before the Illinois Courts Commission implicating important state interests where petitioner has the opportunity to raise all available constitutional challenges.

II.

Whether the U. S. District Court and Seventh Circuit Court of Appeals properly abstained where petitioner failed to allege any facts supporting a claim of bad faith, harassment, or irreparable injury arising from the judicial disciplinary proceedings.

III.

Whether there is a conflict among the circuits and whether the Rules of Judicial Conduct are unconstitutionally vague.

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STATEMENT OF THE CASE

The Respondents, the Illinois Courts Commission and its members, incorporate by reference the statement of facts from the opinion of the United States Court of Appeals for the Seventh Circuit. *Pincham v. Judicial Inquiry Board*, 872 F.2d 1341, 1342-46 (7th Cir. 1989) (Appendix B, pp. 2-9).

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS PROPERLY ABSTAINED UNDER THE *YOUNGER V. HARRIS* DOCTRINE AND DISMISSED THE COMPLAINT

There is a longstanding public policy against federal court interference with state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). The underlying considerations are based on principles of comity, which require "a proper respect for state functions." *Id.* at 44. The courts below gave proper consideration to those principles and abstained to allow the state judicial disciplinary system to operate in accordance with constitutional principles.

While *Younger* involved a First Amendment challenge in a state criminal prosecution, the application of its principles has been extended to civil administrative actions involving important state interests. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt proceedings); *Moore v. Sims*, 442 U.S. 415 (1979) (state action involving child abuse); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986) (First Amendment issues in state administrative proceedings); and *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1977) (civil judgment enforcement proceeding). The petitioner has presented no authority which detracts from the continued validity of the *Younger* doctrine.

The Seventh Circuit specifically relied on this Court's analysis of the *Younger* abstention doctrine in a state attorney disciplinary action as a basis for its decision. In *Middlesex County Ethics Commission v. Garden State Bar*

Association, 457 U.S. 423 (1982), this Court applied a three-prong test in order to determine whether *Younger* abstention was appropriate. The three relevant questions are:

> 1. Do judicial disciplinary hearings, within the jurisdiction of the Judicial Inquiry Board and the Courts Commission, constitute an ongoing state judicial proceeding?;
>
> 2. Do the judicial disciplinary hearings involve important state interests?; and,
>
> 3. Will the petitioner have the opportunity to protect his constitutional rights in the state proceeding?

Each of these questions must be answered in the affirmative.

There is an ongoing state proceeding which is judicial in nature. The Illinois Constitution, 1970, Article 6, Section 15(e) provides:

> A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge

> or Associate Judge who is physically or mentally unable to perform his duties.

The Illinois Courts Commission (Commission) has the indicia of any other court and utilizes the Illinois Code of Civil Procedure and civil rules of evidence. (Appendix A, pp. 25a-6a, n. 11). Clearly, there was an ongoing state proceeding because the Judicial Inquiry Board had voted to file a complaint with the Commission. (Appendix A, p. 25a).

The state's interest in regulating its judiciary is sufficiently important and vital to invoke *Younger* abstention. The entire system of justice in any state hinges upon the judges that are entrusted with the authority to enforce its laws. This Court has already found that the State of New Jersey had an "extremely important interest" in maintaining the professional conduct of the attorneys it licenses. *Middlesex*, 457 U.S. at 435. The conduct of judges, even more so than lawyers, is "essential to the primary function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

It is the petitioner's burden to show that he will not have the opportunity to raise his constitutional claims in the Courts Commission. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). In *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 435 N.E.2d 486, 489 (1982), the Illinois Supreme Court concluded "that its [Courts Commission] constitutional authority to hear and determine disciplinary cases necessarily includes the power to interpret the rules it applies in deciding cases before it." The power to interpret the Illinois Supreme Court Rules of Judicial Conduct would necessarily include the authority to review those rules in light of a

constitutional challenge. The petitioner will have an opportunity to present his constitutional claims in a hearing before the Commission. (See also discussion in part II, *infra*) The courts below properly relied upon the *Younger* abstention doctrine as applied in *Middlesex* to dismiss the complaint.

II.

THE PETITIONER HAS AN ADEQUATE STATE REMEDY IN THE ILLINOIS COURTS COMMISSION

The petitioner argues that no state remedy exists because he would be denied the opportunity to invoke and protect his constitutional rights. Both the District Court and the Seventh Circuit, however, found that petitioner does have ample opportunity to present his constitutional claims before the Commission.

It is the petitioner's burden to show that it is state procedure that would bar the presentation of his constitutional claims. *Moore v. Sims*, 442 U.S. at 433 (1979). Where there has been no attempt to present federal claims in a state proceeding, a federal court should assume, absent unambiguous authority to the contrary, that state procedure will afford an adequate remedy. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. at 15 (1987). Here, petitioner brought this action after a complaint was voted, but before it was actually filed by the Judicial Inquiry Board to attempt to preempt any proceeding before the Commission.

The petitioner's reliance on *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill. 2d 445, 372 N.E.2d 53 (1977), as unambiguous authority in support of his position is misplaced. In *Harrod*, the Illinois Supreme Court

determined that the Courts Commission lacked authority under the Illinois Constitution to apply its own independent construction to a previously uninterpreted criminal sentencing statute in a judicial disciplinary proceeding. Since the Commission was not part of the tripartite court system:

> To grant the Commission such power would interfere with an independent judicial system and would place trial judges in an untenable position. If, as here, the statutory interpretation of the Commission differed from that of the appellate courts, trial judges who followed, as mandated, the guidance of the courts of review, would be subject to sanction by the Commission.

People ex rel. Harrod, 372 N.E.2d at 66.

The Illinois Supreme Court's principal concern was that mere errors of law or simple abuses of judicial discretion should not be the subject of judicial disciplinary proceedings. The holding of the *Harrod* case was very narrow and clearly does not stand as authority for the proposition posited, that the Commission may not interpret the Code of Judicial Conduct in light of a federal constitutional challenge.

In *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 435 N.E.2d 486 (1982), the Illinois Supreme Court clarified *Harrod* and affirmatively stated:

> The Courts Commission is the body with the constitutional responsibility for applying the Rules of Judicial Conduct to particular cases. We conclude that its constitutional authority to hear and determine disciplinary cases necessarily includes the power to interpret the rules it applies in deciding cases before it.

People ex rel. Judicial Inquiry Board, 435 N.E.2d at 488.

The Commission has also interpreted the Illinois Supreme Court Rules in light of constitutional claims on more than one occasion.[1] See *Pincham v. Illinois Judicial Inquiry Board*, 872 F.2d 1331, 1348 (7th Cir. 1989) (Appendix B, p. 15). It would be anomalous to argue that the Commission could not construe its own constitutional and statutory mandate in light of federal constitutional principles. *Cf. Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986).

The petitioner's argument that the District Court made an express finding that state procedure would not afford a remedy for protection of his constitutional rights is unsubstantiated. (Petition at p. 12). To the contrary, the District Court in discussing the finality of the Commissioners' decisions held:

> The fact that no superior court will review the decisions of the Courts Commission does not serve to invalidate the system. Under the New Jersey attorney disciplinary system analyzed in *Middlesex*, only one court – the New Jersey Supreme Court – would hear and decide constitutional arguments. (citation omitted)

Pincham v. Judicial Inquiry Board, 681 F. Supp. 1309, 1323 (N.D. Ill. 1988). (Appendix A, p. 26a).

The District Court went on to note:

> That the members of the Courts Commission, state court judges all [*one Supreme Court Judge,*

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[1] The Commission has considered constitutional challenges in judicial disciplinary hearings in the following cases: *In re Kaye*, 1 Ill. Cts. Comm. 36 (1974); *In Re Elward*, 1 Ill. Cts. Comm. 114 (1977); and, *In Re Teschner*, 2 Ill. Cts. Comm. 43 (1983).

> *two Appellate Court Judges and two Circuit Court Judges. All selected by the Illinois Supreme Court*], have sworn to uphold the rights guaranteed by the United States Constitution. The Court concludes based upon its review of the Rules of Procedure of the Courts Commission as well as based upon the Court's findings with regard to the Courts Commission's state constitutional authority, that the *Courts Commission will hear and resolve Justice Pincham's constitutional claims.* (emphasis added)

Pincham, 681 F. Supp. at 1324. (Appendix A, p. 27a).

Clearly, the Courts Commission provides an adequate state forum where petitioner may invoke his constitutional claims.

III.

THE PETITIONER HAS FAILED TO ESTABLISH ANY EXCEPTION TO THE *YOUNGER* DOCTRINE.

The Seventh Circuit found that petitioner failed to sustain his burden of demonstrating that the state proceeding was brought in bad faith or in an effort to harass petitioner. It further determined that petitioner failed to adequately plead a selective enforcement claim. The Court stated:

> We agree with the district court that Justice Pincham has failed to establish, either in his pleadings or his argument, that the Judicial Inquiry Board and Courts Commission "were 'using or threatening to use prosecutions, *regardless of their outcome*, as instrumentalities to suppress speech.' " *Collins*, 807 F.2d at 101 (quoting *Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 90 S.Ct.

> 685, 24 L.Ed.2d 685 (1970) (emphasis in original)). *See Pincham*, 681 F. Supp. at 1324. We are also in agreement with the trial court that Justice Pincham's allegations of selective prosecution are "sketchy at best and clearly insufficient to make the requisite showing of bad faith or harassment." *Id.* Even if we accept Justice Pincham's allegation that other judges engaged in activity equivalent to his and were not disciplined, we refuse to conclude that there was "bad faith" absent allegations that the state agencies had some awareness of the other judges' activities and treated them more favorably than Justice Pincham as part of a campaign that used prosecutions, regardless of outcome, to suppress speech. Justice Pincham does not make such allegations.

Pincham, 872 F.2d at 1350. (Appendix B, p. 17).

Petitioner alleges that the Seventh Circuit's conclusion was erroneous. He claims that his First Amended Complaint did allege acts of harassment, bad faith and selective enforcement "with certainty and specificity." (Petition at p. 18).

In order to come within the bad faith exception to the *Younger* abstention doctrine, this Court has held that a plaintiff must demonstrate *"proven* harassment or prosecutions undertaken by state officials *in bad faith without hope of obtaining a valid conviction. . . ." (emphasis added) Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

Set forth at page 19 of the Petition is the entirety of petitioner's allegations regarding the bad faith question. Petitioner has merely alleged that other judges participated in political events and that the Commission "has not taken any action." Petitioner did not allege that the

Judicial Inquiry Board or the Commission had any knowledge of these actions, that any complaint had been filed or even that an investigation was conducted by the Board. Petitioner does not allege that the Commission had any intention to harass him or that it acted in bad faith with the intent of suppressing his right to free speech. Thus, the First Amended Complaint is totally devoid of any facts establishing such a claim.

Inexplicably, petitioner concludes without foundation that the Board and the Commission "admitted that they were aware of other judges' political activities." (Petition at p. 20). One combs the record in vain for any such admission.

A close reading of petitioner's allegations reveals that, at best, petitioner has attempted to allege a case of selective enforcement. This Court has been clear that such a claim must be supported by a showing of "intentional or purposeful discrimination." *Snowdon v. Hughes*, 321 U.S. 1, 8 (1944). This Court has stated that " . . . [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). The finding must be based on an impermissible or arbitrary classification. Yet, nowhere in his First Amended Complaint does petitioner allege such deliberate discrimination. Nor could such an allegation be made, as pointed out by the Seventh Circuit, when petitioner cannot even ascribe any knowledge of the alleged political activities of other judges to the respondents.

In addition to the harassment exception to the *Younger* abstention doctrine, courts have carved out two other

exceptions to this doctrine. *Younger* abstention may not apply when a litigant might suffer irreparable injury creating "an extraordinary pressing need for equitable relief." *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975). Such irreparable injury, which provides a basis for the other *Younger* exception, may be established by a showing that the "challenged provision is flagrantly and patently violative of express constitutional prohibitions." *Moore v. Sims*, 442 U.S. at 423 (1979). Petitioner cannot establish either exception in this case.

He has attempted to establish irreparable injury by arguing that the ongoing proceeding before the Commission might have an effect on his First Amendment rights. A chilling effect on First Amendment rights, however, has not been established as a sufficient basis to show irreparable injury. *Younger*, 401 U.S. at 51. In addition, the Seventh Circuit pointed out that a single state judicial disciplinary proceeding is insufficient to demonstrate a chilling effect on petitioner's free speech rights. 872 F.2d at 1350. (Appendix B, p. 18).

Nor can the mere contention that a statute is unconstitutional on its face provide a basis for an injunction against good faith efforts to enforce it. *Younger*, 401 U.S. at 54. Here, it is possible that the Courts Commission may construe the rules in a manner compatible with the Constitution as petitioner himself has admitted. Petitioner has, therefore, failed to establish that the rules in question are "flagrantly and patently" unconstitutional.

No cognizable claim establishing any exception to the *Younger* abstention doctrine has been shown by petitioner.

IV.

THE RULES OF JUDICIAL CONDUCT ARE NOT UNCONSTITUTIONALLY VAGUE

Petitioner argues that the rules applied against him are vague, uncertain and not specific. He asserts that the term "political activity" is imprecise and does not give judges adequate notice of the conduct which the rule seeks to prohibit.

A civil statute violates due process only if it is vague in all its applications. *Hoffman Estates v. Flipside, Inc., Hoffman Estates,* 455 U.S. 489, 495 (1982). The general rule for determining vagueness is whether a person of ordinary intelligence is given "a reasonable opportunity to know what is prohibited so he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). It is also permissible to look at the class of individuals to which the regulation is directed when determining whether the statute is unconstitutionally vague. *Matter of Seraphim,* 97 Wis. 2d 485, 294 N.W.2d 485, *cert. denied,* 449 U.S. 994 (1980). *Hastings v. Judicial Conference of the United States,* 829 F.2d 91, 106 n. 59 (D.C. Cir. 1987), *cert. denied,* 108 S.Ct. 1487 (1988). In positing a vagueness argument, a litigant may only challenge the conduct as applied to him; he may not challenge the rule as it might be applied to the conduct of third parties. *Parker v. Levy,* 417 U.S. 733, 756 (1974). *See also United States v. Powell,* 423 U.S. 87, 93 (1975).

Under the challenged rules, judges are prohibited from engaging in "political activities." This term is capable of being understood by judges who are trained in interpreting legal requirements. The disciplinary rules in

question were specifically adopted by the Illinois Supreme Court to regulate conduct by judges. It is unreasonable to conclude that the term "political activity" is vague. Certainly, it cannot be said to be vague in all its applications.

As demonstrated above, interpretation of the rules in question, in light of petitioner's activity, should be made by the tribunal designated by the Illinois Constitution to hear this matter. Numerous courts have upheld removal of judges based upon the same or similar language as that challenged by petitioner as imprecise.[2] The language at issue is not constitutionally vague.

V.

THE *YOUNGER* ABSTENTION DOCTRINE APPLIES TO CASES INVOLVING FIRST AMENDMENT CHALLENGES. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The petitioner's challenge to *Younger* abstention must stand or fall on whether the state action is the type of proceeding to which *Younger* applies. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 2517 (1989). The mere assertion of a

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[2] *See, e.g., Matter of Randolph*, 101 N.J. 425, 502 A.2d 533 (1986) (upheld "political activity" as a basis for removal of judges); *Halleck v. Berliner*, 427 F. Supp. 1225, 1240 (D.D.C. 1977) (upheld the removal of judges for conduct which is prejudicial to the administration of justice as not unconstitutionally vague); *Napolitano v. Ward*, 317 F. Supp. 79 (N.D. Ill. 1970) ("for cause"); *Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971) (removal of magistrate for bringing judicial office into "disrepute").

substantial constitutional challenge to a state action will not alone compel the exercise of federal jurisdiction. *Id.* at 2516. Here, petitioner argues that recent opinions of this Court have constricted the application of *Younger* abstention in cases involving First Amendment challenges. None of the cases cited by petitioner overcomes the strong public policy considerations enunciated in *Younger*. This Court has consistently held that federal courts must not interfere with ongoing state proceedings.

In *City of Houston, Texas v. Hill*, 482 U.S. 451, 467 (1987), the city urged this Court to abstain for reasons underlying its decision in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), rather than based on *Younger* abstention.[3] In City of Houston, a First Amendment overbreadth analysis was applied by the Court. The pivotal question in determining whether to abstain under *Pullman* was whether the statute was:

> Fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.

City of Houston, 482 U.S. at 468.

In this case, petitioner conceded and the courts below found that the Supreme Court Rules involved were susceptible of a construction consistent with First Amendment principles. *Pincham v. Illinois Judicial Inquiry Board*,

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[3] The Courts Commission also sought to dismiss the complaint in the District Court under *Pullman* abstention principles. That court held that since the principles of *Younger* abstention were controlling, there was no need to reach the applicability of the *Pullman* doctrine. (Appendix A, p. 15a).

681 F. Supp. at 1325 (Appendix A, p. 30a) *Pincham v. Judicial Inquiry Board*, 872 F.2d at 1350 (Appendix B, p. 19).

A First Amendment facial challenge to a statute which gave unbridled authority to a city mayor to issue or deny a license for newspaper dispensing devices was at issue in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The Court concluded that the newspaper could facially challenge the overly restrictive licensing ordinance because of the possibility of significant self censorship involving freedom of the press. This case has no relevance to an analysis of abstention under *Younger* principles because there was no state proceeding at issue.

Fort Wayne Books, Inc. v. Indiana, ___ U.S. ___, 109 S.Ct. 916 (1989), involved jurisdiction of this Court under 28 U.S.C. § 1257, limiting review to "final judgments or decrees" of state courts in the context of criminal cases. *Id.* at 922. In finding an exception to the finality rule under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held:

> Petitioners' challenge to the constitutionality of the use of RICO statutes to criminalize patterns of obscenity offenses calls in question the legitimacy of the law enforcement practices of several states as well as the Federal Government. (footnote omitted) Resolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt.

Fort Wayne Books, Inc., at 109 S.Ct. 923.

Again, *Younger* abstention was not relevant because there was no state proceeding involved.

Finally, the case of *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3rd Cir. 1987), *cert. denied*, 108 S.Ct. 148 (1987), creates no conflict among the circuits. In *Sullivan*, the Third Circuit distinguished the comity issues underlying *Younger* because "where the plaintiff in a federal action is not a party to the state proceeding, *Younger* concerns about federal adjudication do not arise." *Sullivan, Id.* at 177. The Seventh Circuit also distinguished *Sullivan* because it did not find a sufficient basis for " . . . an extraordinary pressing need for immediate equitable relief." (Appendix B, p. 19).

Therefore, petitioner presents no support for his argument that this Court has recently constricted application of *Younger* abstention principles in First Amendment challenges. Further, there is no conflict among the circuits.

Abstention under *Younger* is clearly applicable here because of the vital state interests involved in judicial disciplinary proceedings. The notion of comity remains unchallenged and this Court's policy against federal intervention absent extraordinary circumstances should be applied to the facts of this case.

CONCLUSION

Because petitioner has not identified any issue worthy of plenary review, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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